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No. 87-1001

In the Supreme Court of the United States

OCTOBER TERM, 1987

H. K. PORTER CO., INC., PETITIONER

v.

METROPOLITAN DADE COUNTY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the minority business enterprise (MBE) requirements imposed by the Department of Transportation as conditions for receiving federal funding under the Surface Transportation Assistance Act of 1978, Pub. L. No. 95-599, 92 Stat. 2689, are unconstitutional on their face.

2. Whether the rejection by a county government of a bid on an 80% federally funded construction contract for failure to comply with a 5% MBE participation requirement violates the Equal Protection Clause of the Fourteenth Amendment, where the county government was required by a federal agency to establish unspecified goals for MBE participation in order to qualify for federal funding, and where the county government did not purport either to be remedying discrimination specifically traceable to its own prior actions or to derive its 5% MBE goal from evidence relating to past discrimination.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. In the Surface Transportation Assistance Act of 1978 (STAA), Pub. L. No. 95-599, 92 Stat. 2689, Congress appropriated federal money to assist state and local public bodies in financing the construction of highways and mass transportation systems. The STAA directed state and local public bodies desiring such federal assistance to submit appropriate project proposals to the Secretary of Transportation and to have those proposals approved by him (§ 302(a), 92 Stat. 2735-2736, 49 U.S.C. App. 1602). In addition, it provided, in 49 U.S.C. 1615(a)(1), that "[n]o person in the United States shall on the grounds of race, color, creed, national origin, sex, or age be excluded from participation in, or be denied the benefits of, or be subject to discrimination under, any project, program, or activi-

ty funded in whole or in part through financial assistance under this chapter" and that this non-discrimination requirement was "to be in addition to and not in lieu of the provisions of Title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d *et seq.*]". Further, the Secretary was required to "take affirmative action to assure compliance with [Section 1615(a)(1)]" (49 U.S.C. App. 1615(a)(2)), and, "[w]henever the Secretary determines that any person receiving financial assistance • • • has failed to comply with • • • [it], • • • the Secretary • • • shall require necessary action to be taken to assure compliance • • •" (49 U.S.C. App. 1615(a)(3)(A)). Finally, the STAA authorized the Secretary "to undertake • • • national and local programs that address human resource needs as they apply to public transportation activities," including "training and assistance for minority business opportunities" (49 U.S.C. App. 1616).

In the wake of the STAA's enactment, the Urban Mass Transit Administration (UMTA) of the Department of Transportation (DOT) required all state and local public bodies seeking federal financial assistance for the construction of highway and mass transportation projects to comply with UMTA Circular 1165.1, *Interim Minority Business Enterprise Policy and Requirements for Grant Recipients* (Dec. 30, 1977) [hereinafter Circular], a directive that UMTA had previously issued in connection with its oversight responsibilities under the Urban Mass Transportation Act of 1964, 49 U.S.C. App. 1601-1618. The Circular obligated applicants for grants in excess of one million dollars to establish affirmative action programs for minority business enterprise (MBE) participation in order to further UMTA's "policy that MBEs shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with UMTA funds" (Circular 2). For this purpose, it defined an MBE to be "a business enterprise that is owned and controlled by one or more socially or economically disadvantaged persons[,]" where "[s]uch disadvantage may arise from cultural, racial, chronic economic circumstances or background, or other similar cause. Such persons would in-

clude, but not be limited to, Blacks (not of Hispanic origin); Hispanics; Asians or Pacific Islanders; American Indians or Alaskan Natives; and women, regardless of race or ethnicity" (*id.* at 3). Furthermore, the Circular specified that the contemplated affirmative action plan had to include, inter alia, a policy statement concerning the applicant's commitment to use MBEs; a liaison officer and staff, as required, to administer an MBE program; procedures to ensure that known MBEs have an equitable opportunity to compete for contracts and subcontracts, including access to information and communication programs to make MBEs aware of opportunities and means by which MBEs may be assisted in overcoming barriers to program participation; and "[p]ercentage goals for the dollar value of work to be awarded to MBEs" (*id.* at 4). But the Circular did not prescribe a methodology for applicants to follow in setting the required percentage goals; rather, to ensure "flexibility depending on local circumstances," it left the goal-setting responsibility entirely with the state and local public bodies seeking the federal funding. See *Instructions for the Development of a Minority Business Enterprise Program Pursuant to UMTA C 1165.1, at 6 (Dec. 30, 1977) [hereinafter Instructions].*[1]

In addition to requiring compliance with the Circular, the UMTA began requiring applicants for federal financial assistance in the construction of highway and mass transporta-

[1] The Circular made clear, however, that applicants should review and evaluate their "transportation improvement program to identify those procurement activities which have the greatest potential for MBE participation," and set goals "which are practical and related to the availability of minority firms in desired areas of expertise" (Instructions 6). It further stated that the purpose of the goals is to "provide a benchmark for achievement of the MBE program within a specified time frame" (*ibid.*). It identified "several factors • • • which contribute to successful goal setting," including setting the goals "related to the availability of MBEs," setting different goals "by the type of proposed procurement," taking into consideration "other local MBE goals," and requiring prime contractors to provide "adequate documentation and justification of failure to meet the goals" (*ibid.*); the applicant was to review the goals at least annually and revise them where appropriate (*id.* at 7). The Circular further stated that requests for proposals should make clear that price alone would not be an acceptable basis for rejecting MBE bids (*id.* at 9).

tion projects to comply with DOT Order 4000.7A, *Minority Business Enterprise Program* (Mar. 6, 1978) [hereinafter Order], a directive that the Secretary had promulgated to "increase the participation of businesses owned and controlled by minorities, including women, (MBEs) in contracts and projects funded by the Department," on the theory that these persons "have traditionally been under-represented as owners and managers of businesses in this country" (Order 1). The Order defined an MBE to be a business that is owned and controlled by at least one "individual who [is] Black, Hispanic, Asian American, American Indian, Alaskan native, or a woman regardless of race or ethnicity" (Order 2). It directed each "operating element" within the DOT to require applicants for financial assistance "to present for approval * * * an affirmative action program to promote minority business enterprise" participation (*id.* at 6), including "[p]ercentage goals for the dollar value of work to be awarded to MBEs and reasonable written justification for those goals" (*id.* at 8). Like the Circular, however, the Order did not specify the standards that were to be used in establishing these MBE participation goals.

2. After the STAA was enacted and the UMTA began conditioning STAA funding on compliance with the Circular and the Order, respondent Metropolitan Dade County (MDC) proposed to construct a rapid transit system for the metropolitan area of Miami, Florida, and to have the UMTA fund 80% of the cost of the electrified third rail of the project with STAA monies. See Pet. App. 5; *H.K. Porter Co.* v. *Metropolitan Dade County*, 650 F.2d 778, 779-780 (5th Cir. 1981). After consulting with UMTA, MDC included in its bid specifications a requirement that each bidder either involve MBEs in 5% of the contract work or demonstrate that every reasonable effort to contract and negotiate with minority contractors had been made and that minority contractors simply were not "qualified" or "available" to do the work (Pet. App. 7-8).[2] A contractor was

[2] Like the Circular and the Order, the bid specification defined MBEs to be businesses that are owned or controlled by "individual[s] who [are] Black, Hispanic, Asian American, American Indian, Alaskan native, or [] wom[e]n[,] regardless of race or ethnicity" (Tr. Ex. 1, Addendum No. 3, App. B at 1).

"unqualified" if it was legally ineligible to perform specific work or did not have the licenses, skills, experience, or manpower necessary to comply with MDC's performance schedule; demanding a higher price for doing the work was not necessarily a disqualifying factor. See Tr. Ex. 1, Addendum No. 3, App. B at 2; Tr. Ex. 15, at 24. A contractor was "unavailable" if it was qualified to do specific work but did not intend or was unable to make a proposal because of a lack of interest, an unwillingness to meet specifications, or an unwillingness to work in the pertinent geographical area; again, demanding a higher price for doing the work was not necessarily a disqualifying factor. Tr. Ex. 1, Addendum No. 3, App. B at 2-3; Tr. Ex. 15, at 24.

MDC received three bids in response to its solicitation (Pet. App. 8). Petitioner, H.K. Porter Company, submitted the lowest bid, but left blank the MBE compliance component of the bid form and instead indicated separately that no minority firms produced any of the four products that it could not itself provide (*id.* at 8-9).[3] The second lowest bidder, Transit Products, Inc., protested that qualified minority contractors were available and that it had satisfied the MBE participation requirement (*id.* at 28). MDC therefore held a compliance proceeding, on November 28, 1979, before respondent John Dyer, the county's contracting officer (*id.* at 29). Dyer found that qualified MBEs were in fact available and that petitioner had failed to make every reasonable effort to negotiate and contract with them. See *H.K. Porter Co.* v. *Metropolitan Dade County,* 650 F.2d at 780 n.3. He therefore recommended that the contract be awarded to Transit Products (Pet. App. 29). UMTA concurred in Dyer's decision (650 F.2d at 780-781).

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[3] Petitioner later explained (Pet. App. 9) that it had recently invested in an in-house assembly plant in Chicago and that, due to its in-house assembly plant, only four items from outside sources were necessary to fulfill the contract. Petitioner further stated (*id.* at 9-10) that no minority firms produced any of these four items and that, because of the nature of its in-house plant, it was "economically impracticable" to break down the contract in an attempt to subcontract to MBEs. Petitioner also noted that its Chicago plant employed 33 workers, all of whom were minorities (*id.* at 45).

3. Petitioner immediately brought suit against MDC and Dyer, seeking a temporary restraining order against the contract's award, and alleging that the 5% MBE participation requirement exceeded the authority established by the STAA and violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (Pet. App. 29-30). In addition, petitioner moved for leave to add the Secretary as a party defendant (*id.* at 30). But the district court denied both motions, ruling that the 5% MBE contracting goal was consistent with the STAA, Title VI, and the Constitution (*ibid.*), and declining without discussion to join the Secretary as a party defendant (*ibid.*).

Petitioner filed a timely notice of appeal with respect to the decision on the merits; the United States, participating as an amicus curiae (since petitioner did not appeal the district court's decision on the joinder issue), filed a brief defending the constitutionality of the Circular and the Order. The court of appeals concluded, however, that the case was moot. Pet. App. 31; *H.K. Porter Co.* v. *Metropolitan Dade County*, 650 F.2d 778 (5th Cir. 1981). It reasoned that petitioner sought only to enjoin the awarding of the contract and that, since MDC had awarded the contract to Transit Products while the case was pending on appeal, it could not grant petitioner such relief (*id.* at 782). It thus vacated and remanded with instructions that the district court's order be treated as having no "precedential effect" (*id.* at 783).

4. Petitioner thereupon instituted this action for damages against MDC and Dyer (Pet. App. 10), alleging that the 5% MBE participation requirement, on its face and as applied to petitioner, violated the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. 1981, 42 U.S.C. 1983, 42 U.S.C. 2000d, and 49 U.S.C. App. 1615.[4] Respondents MDC and Dyer answered that the 5% MBE requirement had been imposed only to comply with the conditions that UMTA placed on the receipt of federal funding and that those conditions were valid under

[4] Petitioner also asserted a claim under Florida administrative law, but no longer pursues that claim. See Pet. App. 10, 23.

this Court's decision in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980). Respondents conceded, however, in response to petitioner's request for admissions, that " 'no representative or official of the County or of the United States Department of Transportation made an investigation to determine whether five percent MBE participation was a reasonably obtainable goal or quota in connection with [the] [c]ontract * * *' " (Pet. App. 32 (citation omitted)). They further admitted that " '[t]he 5% participation requirement * * * was not based upon a previous investigation or calculation made by [respondents] or UMTA" (*ibid.*).[5]

On the parties' cross-motions for summary judgment, the district court entered judgment for respondents (Pet. App. 24-55). It noted (Pet. App. 49) that "[t]he Congress gave the Secretary of Transportation the responsibility to take affirmative action to assure compliance with [the non-discrimination provision] of the [STAA]," and that MDC's "bid invitation * * * included * * * the 5% minority business enterprise goal * * * in response to the Secretary of Transportation's Order 400[0].7A and the [UMTA's] Circular 1165.1." The court then held that, "[i]n light of Congress' determination that minorities were not fully participating in public contracts at the federal, state, and local level, Congress had the power to remedy the effects of past discrimination" and that MDC's "modest 5% minority business enterprise goal—not quota—for the Metrorail contract was a valid implementation of Congressional policy" (Pet. App. 49). The court added that "the 5% minority business enterprise goal provision at issue in this case is less burdensome than the 10% minority business enterprise quota upheld against

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[5] Respondents later moved to withdraw these admissions and to proffer evidence allegedly showing that the 5% MBE participation requirement was established only after MDC had determined which portions of the contract could be subcontracted out and what nationally known minority firms were capable of performing such work (Pet. 4; Pet. App. 32). But the district court denied the motion, finding that "there was no evidence to contradict the admissions" (*ibid.*), and that "this information should have been discovered long ago and presented to [petitioner], and it would be prejudicial at this late stage in the proceeding to allow the withdrawal" (Tr. 19-20).

constitutional challenge in *Fullilove*" (*id.* at 50); that the contract "allowed for a waiver of the 5% minority business enterprise goal" (*ibid.*); and that respondents' "refusal to waive the 5% minority business enterprise goal [was] justified on these facts, particularly in light of the second-lowest bidder's ability to find minority-owned subcontractors" (*id.* at 51).

5. The court of appeals affirmed (Pet. App. 1-23). It held that the MBE participation requirement was constitutional on its face and also as applied to petitioner (*id.* at 11, 23).

As to the facial attack, the court noted its agreement with petitioner that "the use of racial, ethnic or sexual preferences as a basis to award government contracts appears to be contrary to the clear language of the statutes" (Pet. App. 12). It further reasoned, however, that "the prohibitions against discrimination contained in [42 U.S.C.] 2000d and 49 U.S.C. 1615(a)(1) [must be analyzed] in light of the legislative and historical context in which the acts arose" (Pet. App. 12-13, relying on *Steelworkers* v. *Weber*, 443 U.S. 193 (1979)), and that the "background giving rise to the promulgation of [Section] 2000d and [Section] 1615(a)(1) clearly indicates that Congress was addressing the need to ensure that minority firms would be provided with a fair opportunity to participate in federally-funded government contracts. Indeed, in § 1615(a)(2) of the Act, Congress delegated to the Secretary of Transportation the responsibility to take affirmative action to assure compliance with Congress' determination that minorities were not fully participating in public contracts at the federal, state, and local level" (Pet. App. 14). The court thus held that "UMTA had the authority * * * to promulgate the MBE program relative to [the] contract" and that, under *Fullilove* v. *Klutznick, supra*, the MBE program was constitutional on its face (Pet. App. 14).

As to petitioner's argument that the MBE provisions of the contracts were unconstitutional as applied, the court initially noted that, under *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986), a preferential classification based upon racial or ethnic distinctions "must be justified by a compelling government interest" and "be narrowly tailored to the achievement of that goal"

(Pet. App. 17). The court then ruled that, with respect to the first prong of the *Wygant* test, "MDC, in implementing the MBE provisions of [the] contract * * *, was acting pursuant to Congress' compelling interest in eradicating the continuing effects of past discrimination against minorities in the participation of government contracts" (*id.* at 18). Citing *Fullilove* v. *Klutznick, supra*, the court rejected petitioner's contention that "MDC was required to make detailed and specific findings concerning past discrimination" (Pet. App. 20). It reasoned that MDC "was relying on Congress' legislative findings which clearly established that minorities were not participating in government contracts" and that, in these circumstances, Congress's "findings provide adequate support for such local projects" (*ibid.*).

The court similarly ruled, with respect to the second prong of the *Wygant* test, that the 5% goal was narrowly tailored to achieve the stated goal of fostering greater minority participation in government contracts (Pet. App. 19). While it was concerned that "[t]he record does not suggest that MDC conducted * * * detailed studies regarding past discrimination against MBE's in the awarding of construction contracts or investigations regarding the availability of MBE's qualified to participate in [the] contract * * * (*id.* at 21), it rested on the fact that "federal courts have upheld affirmative action programs utilizing figures much higher than the modest 5% figure MDC implemented in this case" (*ibid.*) and that, indeed, this Court in *Fullilove* "approved the use of a 10% MBE goal as sufficiently narrowly tailored to be a constitutionally acceptable means of redressing the present effects of past discrimination" (*id.* at 21-22). It added that "MDC's implementation of this affirmative action program does not unnecessarily trammel the interest of non-minority contractors or sub-contractors" such as petitioner, since "[a]ll that was required * * * was that [petitioner] demonstrate that it had made every reasonable effort to meet the 5% MBE provision, or demonstrate that it was unable to do so despite such efforts because minority contractors were not qualified or were not available" (*id.* at 22).

DISCUSSION

1. Petitioner first asks (Pet. i, 10-11) this Court to decide whether the MBE requirements imposed by the DOT as conditions for receiving federal funding under the STAA are unconstitutional on their face. But petitioner does not suggest that there is a conflict among the circuits concerning whether UMTA Circular 1165.1 and DOT Order 4000.7A are facially constitutional. Nor can it suggest that the question is likely to recur; as respondents note (Br. in Opp. 10-11), Congress has since extensively amended the STAA,[6] and the Secretary has replaced the Circular and the Order with regulations specifically designed to implement the new statutory provisions.[7] In any event, petitioner was unsuccessful in his motion to join the Secretary as a party defendant in this litigation, and did not pursue that issue on appeal. As a result, the Secretary has not been afforded an opportunity to develop a record from which to defend the constitutionality of the Circular and the Order (which, prior to becoming defunct, implemented other statutes as well). In view of all these circumstances, as well as the additional fact that petitioner's constitutional rights can be adequately analyzed and protected in the factual context of its challenge to MDC's specific MBE program (see *Papasan* v. *Allain*, No. 85-499 (July 1, 1986), slip op. 23-24), we submit that the facial challenge to the Department of Transportation's program does not merit certiorari review.

2. Petitioner next asks (Pet. i, 11-15) the Court to decide whether the rejection of its bid for failure to comply with the 5% MBE participation requirement of MDC's bid solicitation violates the Equal Protection Clause. As we explain below, this is a substantial federal question and, depending upon what the

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[6] See Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2100 (establishing 10% contracting goal for "socially and economically disadvantaged individuals"); Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 106(c)(1), 101 Stat. 145 (same).

[7] See 48 Fed. Reg. 33432 (1983), codified at 49 C.F.R. Pt. 23; 52 Fed. Reg. 39230 (1987), codified at 49 C.F.R. Pt. 23.

Court decides in *City of Richmond* v. *J.A. Croson Co.*, prob. juris. noted, No. 87-998 (Feb. 22, 1988), may eventually merit this Court's attention.[8]

This Court has "consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality' " (*Loving* v. *Virginia*, 388 U.S. 1, 11 (1967), quoting *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943)). While a majority of the Court has yet to agree upon the precise standard of review applicable in cases challenging governmentally imposed racial or ethnic classifications that favor groups which have suffered discrimination in the past, the Justices have indicated that classifications of this type can be justified only by especially weighty governmental interests and must be carefully constructed to effectuate those governmental interests.[9] Upon close review of this Court's most recent decisions on this sub-

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[8] The court below treated all of petitioner's statutory claims as being essentially co-extensive with its constitutional claim. While this approach is supportable with respect to the Title VI claim (see *Regents of University of California* v. *Bakke*, 438 U.S. 265, 287 (1978) (opinion of Powell, J.); *id.* at 348-350 (opinion of Brennan, J., joined by White, J., Marshall, J., and Blackmun, J.)), it is less supportable with respect to petitioner's claims under 49 U.S.C. App. 1615, which is "in addition to and not in lieu of the provisions of Title VI," and 42 U.S.C. 1981, which prohibits race discrimination against individuals in contracting, including discrimination against white persons (see *McDonald* v. *Sante Fe Trail Transp. Co.*, 427 U.S. 273 (1976)). The petition does not, however, seek certiorari review of this aspect of the court of appeals' judgment and, accordingly, we do not further address it at this time.

[9] See, *e.g.*, *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 274 (opinion of Powell, J., joined by Burger, C.J., Rehnquist, J., and O'Connor, J.) (any racial classification must be justified by "compelling governmental interest" and be "narrowly tailored to the achievement of that goal"); *Regents of University of California* v. *Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J., joined by White, J.) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."); *Fullilove* v. *Klutznick*, 448 U.S. at 537 (Stevens, J., dissenting) ("Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees."); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 301-302 (opinion of Marshall, J., joined by Brennan, J., and Blackmun, J.) ("remedial

ject, we conclude that the rejection of petitioner's bid for failure to comply with MDC's 5% MBE participation requirement probably cannot withstand such judicial scrutiny.[10]

Respondents offer no independently compelling or important interest on the part of MDC that might reasonably be found to justify the race-based rejection of petitioner's bid. They have not suggested that their race-based action was designed to promote any form of racial diversity viewed by Members of this Court as legitimate. See *Regents of University of California* v. *Bakke*, 438 U.S. 311-315 (opinion of Powell, J.); cf. *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 314-316 (Stevens, J., dissenting). Nor have they suggested that their race-based action was designed to remedy prior discrimination traceable to actions by MDC. See *id.* at 274-278 (opinion of Powell, J., joined by Burger, C.J., Rehnquist, J., and O'Connor, J.); *id.* at 288 (O'Connor, J., concurring). Rather, they have candidly admitted that MDC was interested only in ensuring the receipt of federal funding. See Tr. Ex. 15, at 24. But, while the interest in receiving or saving money is clearly rational (*Lyng* v. *Automobile Workers*, No. 86-1471 (Mar. 23, 1988), slip op. 12), such a governmental purpose is not sufficiently "compelling" or "important" to sustain a racial classification. See *Plyler* v. *Doe*, 457 U.S. 202, 227-230 (1982) (preservation of state resources does not justify denial of education to children of undocumented aliens); *Memorial Hosp.* v. *Maricopa County*, 415 U.S. 250, 263 (1974) ("a State may not protect the public fisc by drawing an invidious distinction between classes of its citizens"); *Graham* v. *Richardson*, 403 U.S. 365, 374-375 (1971) ("a con-

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use of race is permissible if it serves 'important governmental objectives' and is 'substantially related to achievement of those objectives' ").

[10] As noted earlier, when this case first reached the court of appeals in 1981, the United States filed an amicus brief defending the facial constitutionality of the Circular and the Order. In the course of that defense, the United States suggested at various points that MDC's MBE participation requirement was likewise constitutional. See U.S. Br. 12-13, 19-21, 21-26. In light of this Court's more recent cases on this subject, especially *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, we have concluded that those suggestions were incorrect.

cern for fiscal integrity is no[t] [a] compelling justification" for denying welfare benefits to resident aliens).

Rather than rely on a "compelling" or "important" interest on the part of MDC, respondents argue (Br. in Opp. 5-9) that the governmental purpose necessary to sustain MDC's 5% MBE participation requirement may be derived from the STAA. More specifically, respondents contend: (a) that, in the STAA, Congress made findings with respect to past discrimination in construction contracting nationwide; and (b) that MDC's MBE program is derivatively justifiable as a remedy for this prior discrimination found by Congress. But these contentions raise more questions than they answer.

First of all, it is quite doubtful that Congress contemplated that the 1978 STAA would impose or authorize a percentage MBE utilization requirement or that Congress made the findings of prior discrimination necessary to support such a provision. In contrast to Section 103(f)(2) of the Public Works Employment Act of 1977 (PWEA), which the Court in *Fullilove* found to be remedial in purpose and supported by a prior history of discrimination, no provision of the 1978 STAA on its face mandates preferences for MBEs or suggests that the 1978 STAA was intended to be in any part a race-conscious remedy for prior discrimination in the construction industry. On the contrary, the STAA explicitly states that "[n]o person * * * shall on the grounds of race * * * be subject to discrimination under any project * * * funded in whole or in part through financial assistance under [the STAA]" (§ 314, 92 Stat. 2750). Moreover, while Congress did provide that the Secretary should take "affirmative action" in administering the STAA, it specified that the object of such affirmative action was to be "compliance with" the statute's non-discrimination requirement (*ibid.*); it did not suggest that the Secretary should take affirmative action to remedy discrimination that pre-existed the enactment of the statute. Nor does the fact that Congress enacted the STAA's non-discrimination and affirmative action requirements shortly after it adopted Section 103(f)(2) of the PWEA, and against the same "backdrop of legislative and administrative programs"

from which the necessary remedial purpose was derived in *Fullilove* (448 U.S. at 467), suggest that Congress meant implicitly to embody similar MBE utilization requirements in the STAA or that an additional racial remedy was justified by the prior discrimination. Nothing in the legislative history of the STAA indicates that Congress found the PWEA (not to mention Title VI) inadequate fully to remedy the prior discrimination it had so found or, more importantly, that the STAA was to be a remedial supplement to the PWEA program.[11]

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[11] To be sure, as the court below noted (Pet. App. 4), "the House report of the Committee on Public Works and Transportation acknowledged a departmental initiative on behalf of the Department of Transportation ('DOT') to encourage the participation of minority business enterprises in the DOT's program." But nothing in this House report suggests that Congress viewed either the STAA or the cited departmental initiative as a remedy for prior, identified discrimination in the construction industry. See H.R. Rep. 95-1485, 95th Cong., 2d Sess. 71 (1978). Indeed, this passage in the House report is not tied to any provision of the House bill, much less to the non-discrimination and affirmative action provisions (which originated in the Senate bill as a means for consolidating the civil rights enforcement authority of the UMTA). See H.R. Conf. Rep. 95-1797, 95th Cong., 2d Sess. 136 (1978); S. Rep. 95-857, 95th Cong., 2d Sess. 4, 26 (1978). Thus, the passage in the House report cannot fairly serve as evidence of any remedial intent on the part of the enacting Congress. See *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47-48 (1950); see generally *Int'l Bhd. of Elec. Wkrs.* v. *NLRB*, 814 F.2d 697, 715-718 (D.C. Cir. 1987) (Buckley, J., concurring); *Hirschey* v. *FERC*, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring).

Nor can the necessary remedial intent be found in the Circular or the Order. While the Circular and Order plainly required applicants for federal financial assistance under the STAA to adopt percentage goals for MBE participation, they were justified only as a means of increasing the participation of MBEs in the performance of contracts financed with federal funds, and not as a remedy for prior, identified discrimination. See Circular 2 (affirmative action program established in order to ensure that MBEs "have the maximum opportunity to participate in the performance of contracts financed in whole or in part with UMTA funds"); Order 1 (MBE requirements imposed to "increase the participation of businesses owned and controlled by minorities, including women, (MBEs) in contracts and projects funded by the Department," as these persons "have traditionally been underrepresented as owners and businesses in this country").

Moreover, even if the Circular or Order had purported to make findings of prior discrimination, we note that Members of this Court have raised the

Furthermore, it is also doubtful that respondents can properly rely upon any remedial purpose Congress may have had as a derivative justification of MDC's MBE participation requirement. In *Fullilove*, the Court (with no majority opinion and three dissenting Justices) held that Congress's findings of prior nationwide discrimination in the construction industry were sufficient to sustain Section 103(f)(2) of the PWEA against facial constitutional attack. But the Court had no occasion, and thus declined, to address any questions relating to specific applications of that MBE program, including the question whether Congress's findings of prior discrimination, which were of a general type, relieved applicants for federal financial assistance of showing that such discrimination was in fact specifically traceable to them. See 448 U.S. at 453, 471, 480-481, 486, 487-488 n.73 (opinion of Burger, C.J.).

Subsequently, however, in *Wygant*, five Justices apparently rejected the argument that a governmental actor may grant racial preferences in order to remedy prior "societal" discrimination—*i.e.*, discrimination that is not traceable to actions by that governmental actor. See 476 U.S. at 274-278 (opinion of Powell, J., joined by Burger, C.J., Rehnquist, J., and O'Connor, J.); *id.* at 288 (opinion of O'Connor, J.); *id.* at 294-295 (opinion of White, J.). And, more recently, the Court has indicated that a state or local government may rely on a federal program in defending against an equal protection challenge only

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question whether the head or component of an agency is competent to provide racial preferences under the authority of either Section 5 of the Fourteenth Amendment or the Spending Power. See, *e.g.*, *Fullilove* v. *Klutznick*, 448 U.S. at 468; *id.* at 515-516 n.14 (Powell, J., concurring); *Regents of University of California* v. *Bakke*, 438 U.S.. at 309-310 (opinion of Powell, J.); cf. *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 292 (O'Connor, J., concurring) ("competent" authority required). This question takes on especially serious proportions where, as here, the administrative agency does not have a mandate from Congress to make such findings or to provide such preferential treatment. See *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 114-116 (1976); cf. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 16-18 (1981) (affirmative duties may not be imposed on states via Section 5 of the Fourteenth Amendment or the Spending Power unless, at a minimum, Congress has "unambiguously" spelled out those duties); see generally *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979).

where it had "no choice" but to follow the dictates of the federal program. See *Papasan* v. *Allain*, slip op. 23. Here, of course, MDC was not required to participate in the federal funding program, and there is no reason to believe that "the financial inducement offered by Congress [was] * * * so coercive as to pass the point at which 'pressure turns into compulsion' " (*South Dakota* v. *Dole*, No. 86-260 (June 23, 1987), slip op. 7 (citation omitted)). Thus, it appears that respondents cannot derive a sufficient remedial purpose for their own particular MBE utilization program from any national findings of prior discrimination that Congress may have made.

In any event, MDC's 5% MBE participation program also fails the requirement that, as a racial classification, it be carefully constructed to effectuate its remedial purpose. Neither Congress nor the Department of Transportation has undertaken in any way to determine the extent to which various minority groups or contractors have been victimized by discrimination. Indeed, the Circular and the Order expressly decline to prescribe a methodology for applicants to follow in setting their percentage goals. See Instructions 6; Order 9-10. And, as respondents admitted in the district court (Pet. App. 32 (citation omitted)), " 'no representative or official of the County * * * made an investigation to determine whether five percent MBE participation was a reasonably obtainable goal or quota in connection with [the] [c]ontract * * *. The 5% participation requirement of [the contract] was not based upon a previous investigation or calculation made by [respondents] or UMTA.' " Indeed, the across-the-board percentage preference for all businesses owned or controlled by individuals in the favored groups was apparently imposed without regard to the actual history of prior discrimination against all or any of the favored groups, and without attention to such issues as whether each group suffered prior discrimination to the same degree as the other groups, whether the individuals in a particular group had already overcome the effects of any prior discrimination, or whether the particular beneficiaries of the preference had actually been victims of prior discrimination. Likewise, there has been no claim that

respondents considered, in determining the percentage figure for each group, the relative strength of non-minority competitors' qualifications, the efficacy of alternative remedies for any prior discrimination that Congress may have found, or the problem of identifying the particular minorities who were to be benefited. In these circumstances, respondents cannot plausibly claim that they carefully constructed their program to achieve the asserted purpose of remedying prior discrimination. See *United States* v. *Paradise*, No. 85-999 (Feb. 25, 1987), slip op. 19-32 (opinion of Brennan, J.); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 284 n.13 (opinion of Powell, J.); *id.* at 293-294 (opinion of O'Connor, J.); *Regents of University of California* v. *Bakke*, 438 U.S. at 315-320 (opinion of Powell, J.); *Fullilove* v. *Klutznick*, 448 U.S. at 532-554 (Stevens, J., dissenting).

Respondents object (Br. in Opp. 4) that they attempted to withdraw the above-referenced admissions and to proffer evidence showing that MDC established the 5% goal only after determining which portions of the contract could be subcontracted out and what nationally known minority firms were capable of performing that work. But the district court denied this motion (Tr. 19-20), finding that "this information should have been discovered long ago," and that "it would be prejudicial at this late stage in the proceeding to allow the withdrawal." It is therefore improper for respondents to raise this objection now. In any event, as the district court also found (Pet. App. 32), the proffer did not "contradict the admissions." Taking the proffer at face value, the simple comparison of the percentage of nationally known minority firms capable of performing the work with the percentage of those retained to do the work *on this particular contract* is no serious effort to identify the extent of actual discrimination, either present or past. Thus, whatever it proves, the proffer does not establish that the program was tailored to a remedial purpose.

To be sure, as respondents note (Br. in Opp. 5, 9-10), MDC had a waiver provision for bidders that did not meet the 5% MBE preference requirement. But the waiver provision only

sought to avoid denial of contract awards for failure to retain unqualified or unavailable MBEs (where qualifications and availability were determined without regard to price). It otherwise inflexibly required bidders to meet the 5% MBE requirement (see pages 4-5, *supra*) and, in any event, did not ensure that the minority groups receiving preferences had been properly identified, that particular minority groups were benefited only to the degree of the actual prior discrimination against them, or that individuals of minority groups who had already overcome the effects of prior discrimination were not benefited. Thus, it did not ameliorate the tailoring problem that existed in this program.

3. The question remains whether the contrary judgment of the court below merits review by the Court at this time. On the one hand, dozens of state and local governments, as well as a variety of federal statutes and administrative regulations, have established set-aside programs—mostly after this Court's affirmance in *Fullilove* of the facial constitutionality of the PWEA program.[12] This fact alone suggests a pressing need for serious constitutional reflection. Further, the courts of appeals are deeply divided over the constitutionality of these programs.[13]

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[12] See, *e.g.*, United States Conference of Mayors and United States Department of Commerce, *1986 National City Profiles: Report on Minority Enterprise Development Program* 1 (1986); 15 U.S.C. (& Supp. IV) 637(d)(1), (6)(A); 22 U.S.C. 2151; 28 U.S.C. 450e(b); 24 C.F.R. 570.424(d)(2), 570.428(d)(2); 36 C.F.R. 906.1(a), (c), 906.3(a).

[13] Compare *Ohio Contractors Ass'n* v. *Keip*, 713 F.2d 167 (6th Cir. 1983) (upholding the facial constitutionality of a state statute that annually reserved for minorities set percentages of state contracts); *Schmidt* v. *Oakland Unified Sch. Dist.*, 662 F.2d 550 (9th Cir. 1981), vacated on other grounds, 457 U.S. 594 (1982) (upholding constitutionality of local government's set-aside plan based on statistical disparity between the minority population of the community and the minority business enterprises that had benefited from the award of school construction contracts); *South Fla.. Chapter of Assoc. Gen. Contractors* v. *Metropolitan Dade County*, 723 F.2d 846 (11th Cir.), cert. denied, 469 U.S. 871 (1984) (upholding facial constitutionality of bidding procedures that required 50% of each contract's value to be subcontracted to black contractors); with *J.A. Croson Co.* v. *City of Richmond*, 822 F.2d 1355 (4th Cir. 1987), prob. juris. noted, No. 87-998 (Feb. 22, 1988) (holding un-

On the other hand, the Court has recently noted probable jurisdiction in *City of Richmond* v. *J.A. Croson Co.*, prob. juris. noted, No. 87-998 (Feb. 22, 1988) and the Court's decision in that case will do much to resolve the conflict and undoubtedly shed much light on the burden that state and local governments bear in justifying their MBE programs. Accordingly, although this case is distinguishable from *J.A. Croson Co.* because it involves (a defunct) federal-state (as opposed to a purely non-federal) set-aside program, the petition should be held pending the decision in *J.A. Croson Co.* and then disposed of as is appropriate in light of the judgment rendered therein.

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constitutional set-aside plan that rested on brief statements concerning generalized racial discrimination in local construction industry and statistical disparity between black population and black-owned businesses); *Michigan Road Builders Ass'n* v. *Milliken*, 834 F.2d 583 (6th Cir. 1987) (holding unconstitutional a state set-aside plan that was not a response to prior discrimination by the state); and *Associated Gen. Contractors* v. *City & County of San Francisco*, 813 F.2d 922 (9th Cir. 1987) (holding unconstitutional a set-aside ordinance that was not based on reliable evidence of prior discrimination by the enacting city).

CONCLUSION

The petition should be held pending the Court's decision in *City of Richmond* v. *J.A. Croson Co.*, No. 87-998, and disposed of as is appropriate in light of the judgment rendered therein.

Respectfully submitted.

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